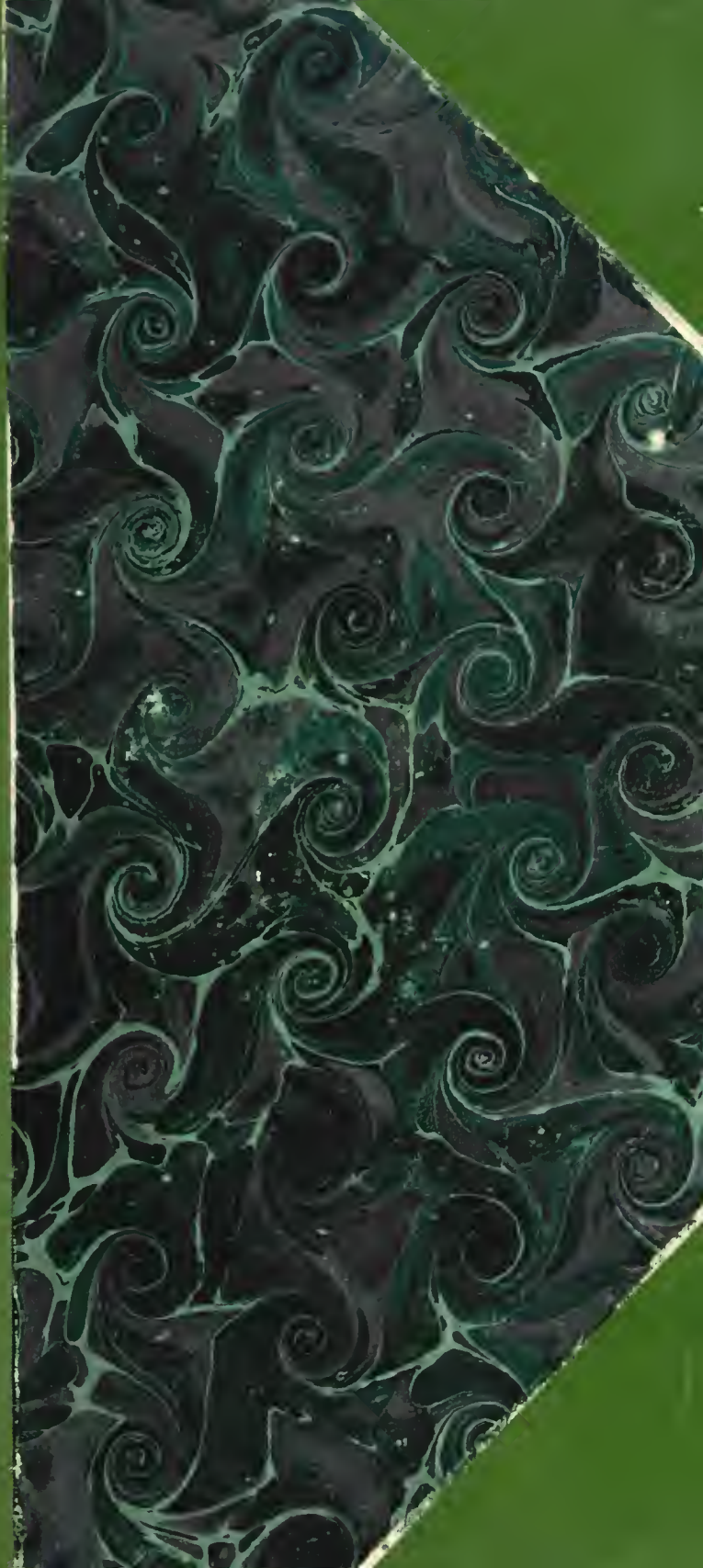

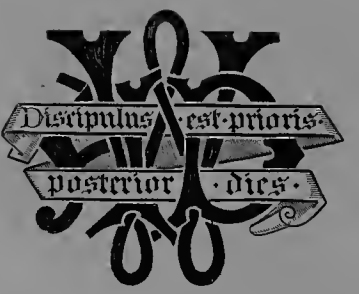

COLUMBIAN UNIVERSITY STUDIES

THE

BERING SEA ARBITRATION

OR

"PELAGIC SEALING" JURIDICALLY CONSIDERED
ACCORDING TO A PARTICULAR ANALOGY
OF MUNICIPAL LAW

BY

JAMES C. Clark WELLING, LL. D.

PRESIDENT OF THE COLUMBIAN UNIVERSITY AND PROFESSOR OF INTERNATIONAL LAW IN THE LAW SCHOOL OF THE UNIVERSITY

THE UNIVERSITY PRESS

JUDD & DETWEILER
PRINTERS TO THE SCIENTIFIC SOCIETIES OF WASHINGTON
WASHINGTON, D. C.
1893

The Columbian University,

WASHINGTON, D. C.

---

1. The University publishes in this form the results of original inquiry or independent research.

2. The University assumes no responsibility for expressions of individual opinion contained in publications made under its auspices.

3. All publications of the University are kept on sale at prices varying with the cost of publication.

4. All communications relating to the purchase of publications should be addressed to The Treasurer of the Columbian University, Washington, D. C.

The price of this publication is twenty-five cents per copy.

THE BERING SEA ARBITRATION;

OR,

"Pelagic Sealing" Juridically Considered According to a Particular Analogy of Municipal Law.

In the primeval state of man property is supposed to have begun with the occupation of things for man's personal use. The Roman Law of Occupation was at once very simple and very strict. Wild animals, as being in their natural state *res nullius*, were held to be convertible into property by occupation; and this for the sufficient reason that what belonged to nobody could be made to belong to anybody who took it. Not, indeed, that *mere* taking gave ownership or value, but that it was only by the instrument of occupation, to the ends of possession, that wild animals could be made serviceable, and therefore valuable, to man. Hence, in enunciating the maxim of the Civil Law, *res nullius occupanti conceditur*, we must emphasize equally each word in the sentence.

In consistency with this maxim, it was held in early Roman Law that the right of occupation which attached to wild animals was a pure *ius hominis*, belonging to any man who captured them. anywhere, for his personal benefit, and not an *ius dominii* resulting from ownership of the soil on which the wild animals were found. The owner of the soil had, indeed, a right to prohibit the entrance of a huntsman on his farm, but he could not claim the wild game which was killed or captured on his premises, even when the killing or capture was effected in violation of his interdict. His remedy was to sue for trespass. Yet as the land-owner, by his interdict, could maintain, *de facto*, the exclusive privilege of hunting on his own grounds, the game found on his soil could be placed practically at his exclusive command.* In cases, therefore, where the game found on land was sparse, casual, and uncertain, it could not be

---

* Digest, xli, 1, 3, §§ 1, 2.

held to constitute any part of the *fructus* of the farm; but in cases where the game could be singled out, as an object of economic significance, it *was* competent to hold and consider it as *fructus*. Hence the doctrine of Julian, when, as we read in the Digest, "he denied that hunting was *fructus* of a farm, unless the *fructus* of the farm resulted from hunting."* In another part of the Digest we read, in consistency with this doctrine, that lucrative returns from fowling, fishing, and hunting pertained to the fructuary,† and even where the hunting was not very important, because it took place in the woods and mountains of a landed estate, we are told that it could be "fairly asserted" (that is, could be asserted in equity) to constitute a part of the usufruct;‡ while this was clearly the case where a hunting-staff or a working-plant was connected with the estate for the express purpose of capturing game.§

With regard to animals which were partially domesticated, and which, by reason of their habits, whether natural or acquired, could be put under a partial human control, a somewhat different rule obtained. To the extent in which these animals, by virtue of their habit for locality, could be made self-subservient to the uses of man, it was held that they became the qualified property of the owner who had domesticated them, or who, by purchase or otherwise, had a right to profit from their custody. The rule under this head, as laid down by Gaius, is as follows:

"As to animals which, from habit, are wont to go away and return, such as pigeons and bees, likewise deer that are wont to go to the woods and return, we have this rule handed down, that if they cease to have a disposition to return [*revertendi animum*] they cease also to be ours, and may become the property of the first takers; and they seem, moreover, to cease to have a disposition to return when they may have abandoned the habit of returning." ||

---

*Digest, xxii, 1, 26: "Venationem fructus fundi negavit esse, nisi fructus fundi ex venatione constet."

†Digest, vii, 1, 9, § 5.

‡Digest, vii, 1, 62.

§Digest, xxxiii, 7, 12, §§ 12, 13.

|| Gaius, ii, § 68: In iis autem animalibus quæ ex consuetudine abire et redire solent, veluti columbis et apibus, item cervis qui in silvas ire et redire solent, talem habemus regulam traditam, ut si revertendi animum habere desierint, etiam nostra esse desinant, et fiant occupantium; revertendi autem animum videntur desiuere habere cum revertendi consuetudinem deseruerint.

The same doctrine meets us in the Digest* and in the Institutes.†

It is easy to perceive the reason and ground of this rule of law. Certain animals, by reason of their *animus revertendi*, can, without their knowing it, be made subservient to the economic control of man. *Sic vos non vobis mellificatis apes.* The *animus revertendi*, as cited by Gaius, is not an index of mansuetude. It exists alike in wild bees and in tame bees,‡ but in the case of the latter it has been seized on by man as an instinct which, under appropriate arrangements (that is, by the inclosure of bees in artificial hives), can be made tributary to economic ends at a spot selected by man and under his control. The animal's state of mind is important only because it serves as an index of the owner's prospect of retaining the animal in his possession.

Speaking in the language of the schools, we may say that man is the *efficient* cause of bee husbandry. The material with which he makes his hives is the *material* cause. The tools with which he constructs hives are the *instrumental* cause. The conditions which prescribe the shape and structure of the hives are the *formal* cause, while economic gain is the *final* cause of the whole proceeding. But in this array of causes, it is the *animus revertendi* which conditionates the whole process, and which, at bottom, is the conditionating factor of the whole process. As the logic of causation shifts with the point of view, if the point of view be shifted from the hives to the bees themselves it must be said that the bees are the *material* cause of bee husbandry, and that the *animus revertendi* is the *instrumental* cause of bee husbandry.

From this analysis it would appear that it is the qualified dominion of man over animals having an *animus revertendi* (that is capable of being turned to economic uses) which gives rise to a qualified property in them. The right of free occupation comes, as to them, under restriction, because they are already the subjects of a prior, though qualified, occupation.

As the Commentators say, the occupation of animals which are by nature *feræ naturæ* implies four conditions: First, The animal at

* Digest, xli, 1, 5.

† Institutes, ii, 1, 15.

‡ Pufendorf is careful to note this fact, as bearing on the logic of the law. He says: "Consuetudinem ad alvearia sua redeundi non adsuetudine hominum, sed propriæ naturæ instinctu, habent; de caetero plane indociles." Puf. De Jure Naturæ, Lib. iv, 6, 5.

the time of capture must be really and entirely *res nullius*. Secondly, It must be taken with a view to possession. The man who kills a wild bird merely to show his skill as a marksman is not an occupant in even an inchoate sense. He may be shooting merely for a wager. Thirdly, The desire of possession, the *animus possidendi*, must be authenticated and effectuated by some definitive act which translates the desire of possession into an accomplished fact. The man who stumbles on a honeycomb in the forest and who desires to possess it, does not make it his by marking the tree on which he finds it, however fixed and sincere may be his purpose to return and take the comb into possession at a future day.* Fourthly, The thing occupied must be of some value in use or exchange; otherwise the *animus possidendi* would not arise, and the act of possession would not be put forth. Rats and mice have an *animus revertendi* which man can only deplore in economics, because their *animus revertendi* cannot be made important from a utilitarian point of view. Dogs have an *animus revertendi*, but it is held by Blackstone that dogs have no intrinsic value at Common Law, as being "creatures kept for whim and pleasure" and not for food. Dogs have intrinsic value in Greenland, because there they are made ancillary to economic ends. A pack of dogs kept as an instrument of hunting would seem to have intrinsic value.

We see, therefore, that the law of occupation, as to animals, has its ultimate foundation in the destination of creatures *feræ naturæ* to subserve purposes of human utility. Hence, it does not surprise us to find that when the Roman jurists came to expound the law of usufruct they brought that law into careful coördination with the law of occupation. The law of occupation was subordinated to the law of usufruct. Whatsoever grew on a farm and whatsoever could be gathered from a farm (under the limitations prescribed by usufructuary law, to wit, *ut boni viri arbitratu fruatur*) was held to be *fructus* of the farm, for the reason that it had value in use and value in exchange. Hence, if there were bees on a farm, it was held that the usufruct of them pertained to the fructuary.† The reference here is not to swarms of wild bees flying across the fields or settling by accident on a tree, for they are not property,‡ but refer-

*Glück: Ausführliche Erläuterung der Pandecten, Ser. xli, xlii, 174.; cf. also 7 Johnson (N. Y.), 16.

†Digest, vii, 1, 9, § 1.

‡Digest, xlvii, 2, 26.

ence is made to domesticated bees kept in a hive for economic uses. In like manner, we read in the same relation that pigeons which are wont to be let loose from a pigeon-house are liable to be counted among valuable assets in a proceeding at law for dividing an estate among the coheirs, and this for the reason that "they are our property so long as they have a habit of returning to us." "If anybody shall capture them," adds the text-writer, "we can properly bring an action of theft against him." *

By parity of reason Pomponius argues, in another place, with regard to a tame fowl, in which the *animus revertendi* is the result of training and not, as in bees, the result of natural instinct, that "if you should hunt down my tame peacock, when it had escaped from my home, until it perishes, I shall, in such case, have it in my power to bring an action of theft against you, if anybody shall have commenced upon him an act of appropriation." †

The jurisprudence of the civilized world is essentially one. The rule of the Common Law coincides with the rule of the Civil Law in regard to domesticated animals which have an *animus revertendi* that is convertible to economic uses. Bracton early brought the doctrine into English jurisprudence as a direct importation from Roman law.‡ "The little busy bee" holds a high place in the legal literature of the world, as well as in descriptive and didactic verse, from the days of Homer to Dr. Watts. If Vergil devotes a whole book of the Georgics to apiculture, it is because of the place which apiculture had in Roman economics. If the text books from Gaius to Blackstone take account of bees, it is because of the property right which attaches to them. It has been ruled that where bees escape from their owner's hive and swarm on a neighbor's land the owner may reclaim them if he can identify them, though he becomes liable to an action for trespass in entering on his neighbor's land to repossess himself of them.§ The inability of the owner of a personal chattel to retake it on the premises of another without committing a trespass does not in the least impair the owner's legal interest in the chattel. It only embarrasses the use or enjoyment of it.‖

---

* Digest, x, 2, 8, § 1.

† Digest, xlvii, 2, 37.

‡ 1 Bracton (Twiss's ed.), 66, 67; cf. 2 Blackstone, 392–394.

§ 2 Devereux (N. C.), 162; 3 Binney (Pa.), 546.

‖ 15 Wendell (N. Y.), 550.

I have cited these principles in order to show in a clear light the ingredients which, according to the written reason of the Roman Law and the rulings of the Common Law, are held to create a property right in animals having a habit of returning to a given spot, if they are there placed under human custody for economic ends. It is not, we see, the mere *animus revertendi* which constitutes value, but the economic uses to which that *animus revertendi* can be put after it has been husbanded by human art, and to which it can be rightfully put, because it represents, at that given spot, the husbandry of human labor and human skill. Where the *animus revertendi* cannot be made the basis of economic use, no effort is made by man to husband it. Where the *animus revertendi* already exists in the case of certain animals, but where it is so vagrant, inconsiderable, and unmanageable that it cannot be counted on with any degree of economic certitude, no effort is made by man to profit by it on any considerable scale. The wild goose in all her migrations has the instinct of return to her breeding place, but it cannot be made the basis of economic purpose or valuation beyond that vagrant purpose and inconsiderable valuation which move in the right of individual capture—a right open to all men wherever they find wild geese, unless they find them flying over land which the proprietor has interdicted to the casual sportsman.

Modern jurisprudence, as everybody knows, has in great measure transformed the right of game-capture from an *ius hominis* into an *ius dominii*. Yet this transformation has wrought no change in the reason and ground on which value is attached to certain animals having an *animus revertendi*. The rule of law continues to depend entirely on the degree to which that quality, under human regulation, can be utilized for economic ends, and this utilization for economic ends (as we see in the case of bees) is most immediately available in the case of animals which have, *by nature*, an habitual disposition of return which so ties them to a given place that the habit may be directly used for economic purposes. The economic aptitudes of such animals, if they be found in sufficient numbers to make their inclosure or husbandry an object of gain, can be made at once the basis of economic computation—a basis of computation almost as fixed as the soil to which they are tied by the habit of return.

For it is precisely in proportion as the *animus revertendi* of useful animals is a stable quality that it lends itself to economics. If at

any place a breed of homing pigeons could be found which should have, *by nature*, the homing instinct, that breed would at once be taken under human tutelage. The industry spent in creating and conserving a homing instinct in the artificial variety would be spent in protecting and conserving the newly discovered breed which had, by natural heredity, that valuable peculiarity; and, other things being equal, still higher sanctions of property would attach to pigeons of such a breed, because, so far as they were taken into human custody, a violation of the property-right in them would be still more injurious to the interests of public and of private economy based on the perpetuation of this more useful variety.

It would seem that these facts in the economics of natural history and the rules of law which have been based on them are not without their application to the controversy now pending between the United States and Great Britain with regard to the capture on the high seas of fur-seals which have their birthplace in Alaska, and which, in all their pelagic migrations, are known to have an *animus revertendi* which gives to the breed a calculable value at the point of fixed return. This *animus revertendi*, it is true, is not the creation of human art in seals, any more than in bees; but for the very reason that it has a fixed quality it can be made, under proper control, the more tributary to man's emolument. On the faith of this instinct, and of the property-right which it conditionates and assures so long as it is not disturbed, the Government of the United States has done infinitely more for the Alaskan seals which it husbands than the most enthusiastic apiculturist has ever essayed to do for the honey bees which he may have domesticated and inclosed in patent hives of the latest construction and most costly variety. The highest resources of state-craft, of administrative policy, of police control, and even of international diplomacy have been put in requisition for the protection of the fur-seal breed, on the ground that the fur-seal husbandry is a factor in our national economics, as well as in the economics of the world; and on the further ground that depredations committed on the seal herds in their pelagic migrations must lead eventually to the destruction of the fur-seal species in Alaska (as has happened elsewhere), and so must inure to the economic detriment of the United States. It is further argued that the capture of seals in their periods of annual migration is attended with circumstances of wanton barbarity and of wasteful excess, which should be prohibited in the interest of public and private morality.

The Government of the United States avers that the Alaskan seal is an amphibious animal, which has its fixed home on Alaskan islands, and that from this home it never long departs, because of its fixed *animus revertendi;* that this fixed *animus revertendi* gives to the breed an economic aptitude of great value; that the seal herds, in their periodical migrations, however far they may roam from land, can still be definitely related to the soil on which they increase and multiply; that the destruction of seals in their passage to their breeding places, when the mother seals are heavy with young, or the destruction of seals as they go forth from the Alaskan rookeries to secure food on the high seas in order to nurture their new-born progeny, involves a reckless waste of valuable animal life, does despite to the qualified property right of the United States, evicts by violence the habitual *animus revertendi* which is the instrument of that right, and so tends to work the gradual but certain extinction, for commercial ends, of a species in which the economy of the civilized world has an interest; that the United States have in the seal husbandry of Alaska a vested right, in so far as the value of the fur-seals may be said to have entered as a consideration into the purchase-money paid to Russia for Alaska, and in so far as the annual value of the fur-seal usufruct, farmed out by the Government of the United States, has been administered with a sedulous regard to the preservation of the breed.

The Government of Great Britain is understood to affirm that fur-seals are indisputably animals *feræ naturæ;* that these have universally been regarded by jurists as *res nullius* until they are caught; that property can vest in them only so long as a person has reduced them into possession by capture; that the qualified right of property for which the United States contend in the case of the seal herds during their periods of pelagic migration is not sound, either in fact or in law, and that, as to such seal herds, on the high seas, it is not competent for the United States, or for any "private interest" holding under them, to assert any priority or pre-eminence of right. To this effect Sir Julian Pauncefote, in his communication of April, 1890, held the following language:

"It has been admitted from the commencement that the sole object of the negotiation is the preservation of the fur-seal species for the benefit of mankind, and that no considerations of advantage *to any particular nation or of benefit to any private interest should enter into the question.*"

In a dispatch under date of May 22, 1890, Lord Salisbury wrote:

"Her Majesty's Government would deeply regret that the pursuit of fur-seals on the high seas by British vessels should involve even the slighest injury to the people of the United States. If the case be proved, they will be ready to consider what measures can be properly taken for the remedy of such injury, *but they would be unable on that ground to depart from a principle on which free commerce on the high seas depends.*"

For the purposes of the following discussion it is not pretended that the exploded doctrine of *mare clausum* should be installed in place and power to protect an interesting and valuable species of animals. The doctrine of *mare liberum*, as expounded by Grotius, need not be impeached; but the doctrine of *mare liberum* is itself a juristic conquest—a conquest which in the progress of juridical ideas among the nations of the earth has been slowly gained over the doctrine of *mare clausum* as formerly asserted by Great Britain, Spain, and Portugal. The modern doctrine is juristic in its genesis, and therefore cannot come in conflict with the juristic rights of the United States, if they have any, in the Alaskan seal herds found on the high seas. The rationale of the doctrine of *mare liberum* is well summed up by Hall when he says: "It is commonly stated that the sea cannot be occupied, it is indivisible, inexhaustible, and productive, so far as it is productive at all, *irrespectively of the labor of man;* it is neither physically susceptible of allotment and appropriation, nor is there the reason for its appropriation which induced men to abandon the original community of goods."*

But the Government of the United States maintains that the Bering sea, so far as it is "productive" of Alaskan seals, is not now and will not long remain a nursery of seals "*irrespectively of the labor of man.*" Much of labor has been expended by the United States for the safe guarding of the seals in their breeding places. The sea has been patrolled by American cruisers for the protection of the seal herds. A "close season" has been concerted between the governments of the United States and Great Britain for the restriction of seal slaughter; and it is because the permanent protection of the seal herds calls for international action beyond the maritime jurisdiction of the United States that the arbitration of a mixed commission has been invoked, to the end that by its verdict

* Hall: International Law, p. 148.

the "important element of finality may be secured" as between the two governments most immediately concerned, and to the further end that a firm basis may be laid for the lasting settlement of the question by providing for the adhesion of other governments.

To the writer of this paper it does not seem that the United States, in the purchase of Alaska from Russia, bought along with it a *mare clausum* in the Bering sea. The United States could not buy more than Russia had to sell. But the United States *could* buy from Russia a right to the undisturbed enjoyment of the Alaskan seal usufruct on sea, as well as on land, for this is a right which Russia enjoyed and a right which, attaching as it does to animals having the *animus revertendi*, is rooted in a rule of reason and of law as old as the property law of historical jurisprudence. The rule was old in the days of Gaius. He says it is one which in his day had been "handed down" as settled law.

It has been well said by Sir Travers Twiss that "the right of fishery comes under different considerations of law from the right of navigation, as the right of fishery in the *open sea* within certain limits [the three-mile zone] may be the exclusive right of a nation. The *usus* of all parts of the open sea, in respect of navigation, is common to all nations, but the *fructus* is distinguishable in law from the *usus*, and, in respect of fish or zoöphites or fossil substances, may belong in certain parts [that is, within the aforesaid zone] exclusively to an individual nation."*

Sir Travers elsewhere argues that the right of fishing in the open sea is common to all nations "on the same principle which sanctions the common right of navigation, namely, that *he who fishes in the open sea does no injury to any one, and the products of the sea are in this respect inexhaustible and sufficient for all.*"† It would be impossible to conceive a negative pregnant more emphatic against the assumed right of fur-seal capture, for such capture of Alaskan seals works a positive "injury" to the United States, and tends to exhaust a supply which is *not* "inexhaustible" and *not* "sufficient for all." The freedom of the ocean has no more vehement assertor than Calvo, yet he admits that, by international convention, there may be partial "derogations" from that freedom when such

* Twiss: Law of Nations (in Time of Peace), 311.

† Twiss: Law of Nations (in Time of Peace), 300.

1 Calvo: Droit International, 481.

"derogations" are "dictated by a maritime interest of first order, *notably, the exploitation of coast fisheries of an exceptional nature.*" And what can be more "exceptional" than the exploitation of the "maritime interest" which the United States have in *fur-seals born on their own soil?*

As the *animus revertendi* insures the owner's property right in inclosed bees, when they have swarmed (in such way as to be identifiable) on the land of a neighbor, though they cannot there be reclaimed without "trespass," it would seem not unreasonable to hold that the owner's property right in inclosed seals should be secured by their *animus revertendi* during the period of their pelagic migrations, since, if they are of right reclaimable at all, they are there reclaimable without liability to indictment for "trespass." Writs will not run either for the action in trover or of trespass on the case within the "no-man's-land" of the inappropriable ocean; but the rules of right between two nations ought to be essentially the same as the rules of right between two individuals, however different may be the rules of procedure. Though our Archbold cannot help us here, the great maxim, "*Honeste vivere; Alterum non lædere; Suum cuique tribuere,*" should certainly be as much the breviary of International Law in this year of Grace as it was of Roman Law under the Cæsars.

The right of each nation to claim jurisdiction over its territorial waters to the extent of a marine league from the coast line is vindicated by Mr. Henry Sidgwick, among other reasons, on the ground that "each country should have the power of regulating the fisheries on its coast, *to prevent wasteful exhaustion of the supply.*"* But, to prevent the "wasteful exhaustion" of the *seal* supply, it is as necessary that seals should be protected in their pelagic migrations as in their breeding places; and the qualified property enjoyed by the United States in the Alaskan seal herds, by virtue of their *animus revertendi*, would seem to justify the claim that that right should be as sacred under international as under municipal law. It was held under the Civil Law that whether an animal has lost its *animus revertendi* or not is a question of fact, and that he who, while the *animus* still persists, seeks to dislodge it by a premature capture has committed upon that animal an act of theft.† It is on the fixed quality of this *animus* in the Alaskan

* Henry Sidgwick: Elements of Politics, p. 241.

† Glück: Pandecten, Ser. xli, xlii, p. 46.

seals, and on the property right which it authenticates so long as it persists, that the owner, it would seem, may base a reasonable claim that his property right in them shall not be divested by a premature, and therefore an unlawful, capture. And the question of fact as to the persistency of the *animus* does not depend at all on the distance to which the normal excursions of the animal may extend in its outgoings and incomings. This distance, if great, only embarrasses the vindication of the property right by embarrassing the pursuit of the animal. It does not extinguish the right, if the *animus* continues to be lodged in the animal. In the case of the carrier-pigeon, the distance to which he extends his flight, while preserving the *animus revertendi*, does but increase his value. The honey-bee, the carrier-pigeon, and the Alaskan seal have each a radius of migration according to their kind. Ease or difficulty of perquisition in the case of estrays affects legal remedies rather than legal rights, just as formerly in the Isle of Man it was held to be no felony to take away an ox or an ass, but only a trespass, because of the difficulty in that little territory of either concealing or carrying off such big quadrupeds; while to steal a pig or a fowl was punishable with death, because the facility with which that crime could be committed seemed to require a strong deterrent.*

To hold that the *animus revertendi* of Alaskan seal herds is sacred from assault within three miles from the shore, but is open to marauders' violence at a distance one mile further (while the *animus revertendi* remains just as strong in the remoter as in the nearer stretches of their migrations), is to play fast and loose with this rule of right, and so to convert it into a delusion and a snare. The seal husbandman who should learn that the *animus revertendi* of bees will protect the owner's right in them indefinitely, even when it runs on land where another has the *ius dominii*, but that in the case of seals it will not run on salt water more than three miles, though outside of that limit nobody has a *ius dominii* to plead against it, (and though, too, it is just as strong at a distance of four miles or four hundred miles outside of that limit as at a distance of one mile inside of the limit), might be sorely tempted to commit even a worse irreverence than that of Mr. Bumble when, in his legal discomfiture, he exclaimed, "The Law is a ass, a idiot!"

For the purposes of this discussion it is not pretended that the Government of the United States, by its unilateral act, has the

* 4 Stephen's Commentaries, 108.

right to declare, as a dictum of International Law, that the capture of pelagic seals is *contra bonos mores*. That maxim has a definite meaning in law, and cannot be stretched to cover newly emergent cases in international ethics. "Just as the legal obligations of an individual are defined, not by the moral ideal recognized in the society to which he belongs, but by the laws in force within it, so no State can have the right to demand that another State shall act in conformity with a rule in advance of the practical morality which nations in general have embodied in the law recognized by them."* Nations in general have not pronounced the capture of seals on the high seas to be *contra bonos mores*. The reply of Lord Salisbury under this head seems to be conclusive, but it is a reply which moves, and was intended to move, in *static* law alone. The argument of Mr. Blaine moves in what we may call the *dynamics* of International Law, because it moves in the direction of that "moral ideal" which is the perpetual *point de mire* of an advancing civilization—a moral ideal accepted by Lord Salisbury himself when he says that "Her Majesty's Government would deeply regret that the "pursuit of fur-seals on the high seas by British vessels should in-"volve even the slightest injury to the people of the United States."

That the capture of mother seals heavy with young is as morally barbarous as it is economically wasteful would seem to be clear in ethics. Under the Mosaic Law it was forbidden to take the mother bird with her young, if she were found sitting upon her fledglings or upon eggs "in a nest on the ground or in any tree."† The motive of the law was partly economic (to prevent the extinction of the bird species) and partly humanitarian (to prevent cruelty to animals and the human brutalization which such cruelty engenders). The economic motive of the law is so obvious that it was caught up and enshrined in the popular verse of the *Carmen Monitorium*, ascribed to the Greek poet Phocylides, but commonly supposed to have been written under his assumed name, in the fourth century of the Christian era.‡ The municipal law of the civilized world inhibits the slaughter of game during the breeding season.

---

* Hall: International Law, p. 5.

† Deuteronomy, xxii, 6, 7.

‡ Gaisford: Poetæ Minores Græci, vol. i, p. 451:

Μηδέποτε χρήστης πικρὸς ἀνδρὶ πένητι,
Μηδέ τις ὄρνιθας καλιῆς ἅμα πάντας ἑλέσθω,
Μητέρα δ' ἐκπρολίποις, ἵν' ἐχῇς πάλι τῆσδε νεοσσους.

For the purposes of this discussion it is not pretended that an assimilated "action in trover" should lie in the forum of International Law against the American or Canadian seal hunter who spears an Alaskan seal on the high seas and converts it into his private property under color of the law of occupation; but it is hoped that the same property right which in the case of honey-bees has been vindicated by the Municipal Law of the civilized world, and the same property right which in a suit at Common Law has been vindicated even in the case of dog-whelps, musk-cats, and monkeys—"*because they are merchandise*"*—may now be found capable of substantiation and protection under the ægis of international convention. The Alaskan seals find, for the time being, a partial safeguard under the shield of the *modus vivendi* concerted between the two governments. It is simply proposed to put that safeguard under the terms of a permanent and effective international arrangement.

As has been well said by the German jurist Jhering, "he who "battles for constitutional and international law is none other than "he who battles for private law; the same qualities which dis- "tinguish him when struggling for his rights as an individual "accompany him in the battle for political liberty and against the "external enemy. What is sowed in private law is reaped in public "law and the law of nations. In the valleys of private law, in the "very humblest relations of life, must be collected, drop by drop, "so to speak, the forces, the moral capital, which the State needs "to operate on a large scale and to attain its ends."†

As civilization advances, the law of occupation recedes.‡ That law finds to-day its highest theatre in the *occupatio bellica* of "grim-visaged war," but even grim-visaged war has learned to "smooth his wrinkled front" in the presence of private property. The jurisprudence of the world should keep pace with the prudence of the world. Among writers on the philosophy of law there is none who is more inclined to glorify the Law of Force than Adolph Lasson; yet Lasson is quick to acknowledge the diminishing sway of the Law of Occupation. To this effect he says that as the domain of positive law widens, the domain of the law of occupation must needs

*3 Levinz, 336.

†Jhering: The Struggle for Law, p. 93.

‡See Glück: Pandecten, Ser. xli, xlii, pp. 29, 30, for an exposition of this self-evident thesis.

shrink into a narrower and narrower compass.* And, at bottom, under the circumstances and conditions of the arbitration agreed upon, the question now pending between the United States and Great Britain with regard to the fur-seals of Alaska is this, Will the property rights of the civilized world and the interests of a growing civility among nations be better subserved by remitting the capture of seals on the high seas to the primeval law of occupation, or by putting that law under the restrictions of international equity and of a progressive humanity?

Let it here be noted, says my learned colleague, Prof. Henry E. Davis, that "this is the question only under the circumstances and "conditions of the arbitration agreed upon; for, the arbitration "out of the account, this statement of the question would yield "too much on the part of the United States. The relation of the "United States to the seals is really analogous to, if not identical "with, that of the individual who by domestication of animals *feræ* "*naturæ*, such as bees, has acquired in them a recognizable and ad- "mitted property. In the case of animals *feræ naturæ* domesti- "cated by man the property-right is clear. In the case of the seal "we have an animal juridically *feræ naturæ* in a qualified sense "only: for its *animus revertendi* is matter of nature, not of art, "and is, besides, territorially circumscribed in operation; that is "to say, in the case of the seal the *animus revertendi* has and "can have operation only in respect of a territory the admitted "property and in the conceded dominion of the United States. It "is as though we had a species of the bee engendered, and capable "of being engendered, upon a given spot only, and by force of "its nature ineradicably instinct with the disposition—nay, under "the necessity—of returning to that spot. In such a case the *ius* "*hominis* really gives place to the *ius dominii*, and the animal may "justly be said to be no more *res nullius* than the tree and its fruit "grown and growing on the soil of an individual proprietor.

"The question, arbitration apart, might then fairly be put thus: "Given the seal, with its territorially circumscribed *animus rever-*

*Lasson: Rechtsphilosophie, 606: "Mit dem Rechtszustande erst tritt die Forderung ein, dass fortan alle Eigenthumsveränderung auf rechtliche Weise zugehe, und dass Eigenthum erworben und verloren werde nur in den vom Rechte ausdrücklich vorgeschriebenen Formen, die sich dem Principe der Gerechtigkeit möglichst anzunähern trachten. Auf engsten Raum beschränkt bleibt fortan die Occupation, die blosse Aneignung der Sache aus eigenem Belieben."

"*tendi* as part of its nature,—indeed, part of the animal, as much "so as its instinct to maintain its life by food—is such an animal "juridically *ferœ naturœ?* or is it not, by force of this very part of "its being, a subject of property *per se?*"

"But, as above stated, the question, in view of the arbitration, "may, for the purposes of the argument, be conceded to be as first "expressed. And, the question thus put, what is its answer?"

It is not understood that the Government of the United States has waived any of its property rights in Alaskan seals preliminarily to the impending arbitration. It has simply agreed to take the judgment of a mixed commission on the foundation, nature, and extent of its rights, and expects, of course, to abide by that judgment. It is certain that the author of this paper has not intended to abate those rights when, to the extent of this argument, he seeks to identify them with the obligations and interests of that closer intercourse among civilized nations which seems to call for their free acknowledgment.

The *ius fruendi* of property in land carries with it a right to the products of the land. The *ius fruendi* of property in animals carries with it a right to the natural increase of such animals; and not to the *natural* increase alone, but also to any increase which may come from what the Roman lawyers have called the right of "Accession." The maxim of Accession is "*Accessio cedat principali*"—"Let the accessional thing follow the principal thing."* The doctrines of Accession, says Blackstone,† "are implicitly copied and adopted by our Bracton in the reign of King Henry III, and have since been confirmed by many resolutions of the courts." Wild pigeons joining a flock of inclosed pigeons and wild bees joining a swarm of inclosed bees, says Ortolan, are gathered to the inclosed animals under the law of accession, and are no more open to occupation than the animals originally inclosed.‡ The law of accession, we see, runs with the law of occupancy, with the rule of *animus revertendi*, and with the law of usufruct, while the comment of

* Digest, xxxiv, 2, 19, § 13.

† 2 Blackstone, 404.

‡ 1 Ortolan: Explication Historique des Instituts, Liv. ii, 366, 367: "Ainsi, que des pigeons, que des abeilles sauvages, attirés par mes pigeons, par mes abeilles domestiques, viennent se joindre à eux et s'établir dans mon colombier, dans mes ruches, même à mon insu, ces animaux, et le produit qu'ils y donneront, m'appartiennent; celui qui viendrait les y prendre commettrait un vol."

Ortolan meets very neatly the plea of the fur-seal hunter who should allege that the seal which he speared in the Bering sea was probably a "foreign" seal. There are, it is understood, no foreign fur-seals in the waters covered by the pending arbitration, and if there were they would, when found in the company of the Alaskan seal herds, be gathered to those herds, and would be as much the property of the Alaskan seal husbandman as the members of the brood which originally started out from the Pribyloff islands. And, when we consider the tie which binds the Alaskan seal herds to the Alaskan soil, it seems proper to ask whether these herds are more appurtenant to the land in which they have their native home and to which they have a fixed habit of return, or whether they are more appurtenant to the seas in which they make excursions? And whether, too, in point of public and of private economy, the petty interest of the pelagic sealer or the vast interest of the United States in the seal herds should be held "the principal thing" in this great concernment? To ask such questions is to answer them. The seal husbandry of the pelagic hunter is vagrant, casual, and desolating. The seal husbandry of the United States is stable, provident, and conservative, because it is based on property rights resulting from ownership of the soil on which the seals breed, from ownership of the herds on that soil, from control over the herds within "the three-mile zone," and from the legal rule of *animus revertendi*, which ties them juridically to that soil. The primeval law of occupation does not extend, as has been already said, to animals which are the subjects of prior, though qualified, occupation. To place amphibious animals, like seals, on the same level as creatures *ferœ naturæ* born and living in the sea, is as illogical and unscientific as in point of juristic reason it is violent and inequitable.

It is at once a truism and a commonplace to say that progress in the social, economical, and political relations of the human race must of necessity work with a constant reformative power on the body of law from age to age. It is this dynamic conception of the evolutionary process involved in the world's law-making which gives such a practical value to the study of the world's historical and comparative jurisprudence; for it is only by such a philosophical study that we can attain to the grounds of a scientific forecast where new social, civil, and international situations seem to call for new jural arrangements. The civilized nations of the earth form to-day a close society. *Ubi societas ibi ius. Ubi ius ibi obligatio.* The Law of Nations, it is true, has neither law-giver nor supreme

judge; but it has its own peculiar genius and its own peculiar sanctions. "Its organ and regulator is Public Opinion. Its supreme tribunal is History, which forms at once the rampart of justice and the Nemesis by which injustice is avenged." In the moral preparations which precede it, the Law of Nations comes slowly and comes from afar, but critical conjunctures are often the birth-pangs of its new deliverances; for though national morality is but the modified reflex of private morality, and though international morality is but the modified reflex of national morality, it is important to observe that when ameliorations of moral conduct are demanded among civilized nations they may often be more readily and speedily secured than the ameliorations of moral conduct which are demanded among individual men in the figure of civil society. So various, divergent, and mutable are the free wills of individual men that it is impossible to concert among them a forward moral movement, along the whole line, in the bosom of any large civil community. The community of civilized nations, on the other hand, is small in its membership; the relations of independent states to each other are comparatively simple; their actions and interactions move on the broader lines of public policy, and move, too, in the sunlight of publicity. Where new moral and legal departures are required in international intercourse, they may come suddenly with the opportunism which paves the way for them. And they will come to stay in a Christian civilization, because they represent the sovereignty of moral ideas, and because they spring from a growing faith in the moral order of the universe.

It will be seen that this whole discussion has revolved around a single point of law, which, if well taken, would seem to be determinative of the main issue joined in the "Bering Sea Arbitration." A doctrine of law does not vary with the magnitude of the issues that turn on it. If it is sufficient to reclaim a flock of pigeons it *ought* to be sufficient to reclaim a herd of seals. If it be good as between neighbors under municipal law, it *ought* to be good as between neighbor nations under international law. No attempt has here been made to argue the American case or to traverse the British case at any other point. Indeed, the student of International Law has nothing to do with the *American* case as such or with the *British* case as such. He seeks simply to find in the pending litigation the rule of right which should obtain in a government of the nations, by the nations, and for the nations, to the end that righteousness may be as much the law of the sea as the law of the land.